

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 99-005 (MMS)
)	
DENTSPLY INTERNATIONAL, INC.,)	
)	
Defendant.)	

**PLAINTIFF’S OBJCTIONS AND RESPONSES TO
DEFENDANT’S REQUEST FOR DOCUMENTS**

Plaintiff, by and through its attorneys, and pursuant to Rule 34 of the Federal Rules of Civil Procedure and the Local Rules of this Court, responds and objects to Defendant Dentsply International, Inc.’s (“Dentsply”) Request for Documents as follows:

PRELIMINARY STATEMENT

1. Plaintiff’s investigation and development of all facts and circumstances relating to this action is ongoing. These responses and objections are made without prejudice to, and are not a waiver of, Plaintiff’s right to rely on other facts or documents at trial.

2. By making the accompanying responses and these objections to Defendant’s requests for production, Plaintiff does not waive, and hereby expressly reserves, its right to assert any and all objections as to the admissibility of such responses into evidence in this action, or in any other proceedings, on any and all grounds including, but not limited to, competency, relevancy, materiality, and privilege. Further, Plaintiff makes the responses and

objections herein without in any way implying that it considers the requests or responses thereto to be relevant or material to the subject matter of this action.

3. Plaintiff will produce responsive documents only to the extent that such documents are in the possession, custody, or control of the Antitrust Division of the U.S. Department of Justice, as set forth in the Federal Rules of Civil Procedure. Plaintiff's possession, custody or control does not include any constructive possession that may be conferred by the Antitrust Division's right or power to compel the production of documents from third parties or to request their production from other divisions of the Department of Justice or agencies of the United States.

4. Plaintiff expressly reserves the right to supplement, clarify, revise, or correct any or all of the responses and objections herein, and to assert additional objections or privileges, in one or more subsequent supplemental response(s).

5. Plaintiff will make available for inspection at Plaintiff's offices responsive documents and things. The responsive material includes teeth, shade guides, a video tape and a CD-ROM. Alternatively, Plaintiff will produce copies of the documents, except the teeth, the shade guides, the videotape, and the CD-ROM, all of which will be available for inspection at Plaintiff's offices.

6. Publicly available documents including, but not limited to, newspaper clippings, court papers, and documents available on the Internet, will not be produced.

GENERAL OBJECTIONS

1. Plaintiff objects to each instruction, definition, and document request to the extent that it purports to impose any requirement or discovery obligation greater than or

different from those under the Federal Rules of Civil Procedure and the applicable Rules and Orders of the Court.

2. Plaintiff objects to each document request that is overly broad, unduly burdensome, or not reasonably calculated to lead to the discovery of admissible evidence.

3. The Parties currently are in discussions about the appropriate scope of the privilege log. Plaintiff objects to each document request to the extent that it calls for production of a privilege log for internal documents of the Antitrust Division. A request for such a log is unreasonable and unduly burdensome in light of the work product doctrine, governmental deliberative process privilege, and other privileges protecting such internal documents from discovery. Therefore, given the ongoing discussions about the scope of the privilege log and Plaintiff's objections to a request for such a log, Plaintiff will not produce a log of this material at this time.

4. Plaintiff objects to each definition, instruction, and document requests, to the extent that it seeks documents protected from disclosure by the attorney-client privilege, deliberative process privilege, attorney work product doctrine, or any other applicable privilege. Should any such disclosure by Plaintiff occur, it is inadvertent and shall not constitute a waiver of any privilege.

5. Plaintiff objects to each definition, instruction, and document request as overbroad and unduly burdensome to the extent it seeks documents that are readily or more accessible to Defendant from Defendant's own files or documents that Defendant previously produced to Plaintiff. Responding to such requests would be oppressive, unduly burdensome and unnecessarily expensive, and the burden of responding to such requests is substantially the

same or less for Defendant as for Plaintiff. This objection encompasses, but is not limited to, documents previously produced by Defendant to the Antitrust Division of the Department of Justice during the Antitrust Division's civil investigation of Dentsply's distribution and marketing of artificial teeth, all transcripts of depositions of employees and former employees of Defendant, and all correspondence between the Plaintiff and Defendant. All such documents will not be produced.

6. Defendant's document requests call for the production of documents that were produced to the Plaintiff by other entities and that may contain confidential, proprietary, or trade secret information. As set forth in the correspondence dated March 3, 1999 from Michael S. Spector to Kelly A. Clement, Plaintiff objects to the production of those parties' confidential documents and will not produce those documents unless directed by the Court to do so pursuant to Del. D. Ct. Local Rule 26.2 or pursuant to a Protective Order entered by the Court.

7. To the extent any of Defendant's document requests seek documents that include expert material, including but not limited to survey materials, Plaintiff objects to any such requests as premature and expressly reserves the right to supplement, clarify, revise, or correct any or all responses to such requests, and to assert additional objections or privileges, in one or more subsequent supplemental response(s) in accordance with the time period for exchanging expert reports to be determined by the Court.

8. Plaintiff incorporates by reference every general objection set forth above into each specific response set forth below. A specific response may repeat a general objection for emphasis or some other reason. The failure to include any general objection in any specific

response does not waive any general objection to that request. Moreover, Plaintiff does not waive its right to amend its responses.

OBJECTIONS TO INSTRUCTIONS AND DEFINITIONS

1. Plaintiff objects to Definition No. 2 regarding “DOJ.” The Definition is overbroad and unduly burdensome to the extent it attempts to extend the scope of this document request to documents in the possession, custody, or control of individuals, agencies, or entities other than the Antitrust Division of the Department of Justice and its present employees, principals, officials, agents, attorneys, economists, and consultants either assigned to or reviewing this case.

2. Plaintiff objects to Definition No. 4 regarding “document” or “documents” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure.

3. Plaintiff objects to Instruction No. 3 on the grounds that it is vague and ambiguous, that it calls for the production of documents that are irrelevant to this action and not reasonably calculated to lead to the discovery of admissible evidence, and that it is overly broad and unduly burdensome, to the extent that it calls for the production of documents in the format as they may be maintained in files outside of the principal investigatory and case files. Copies of certain materials, including internal memoranda to which documents obtained from outside parties may have been attached, are circulated to and may be maintained in files kept in Antitrust Division files other than the principal investigatory and case files. The originals of all such memoranda and documents are maintained in the principal investigatory and case files, and any handwritten annotations or comments that may be added to such documents by others

in the Division would be protected by the work product doctrine, governmental deliberative process privilege, or other applicable protection. Plaintiff objects to producing these duplicative, privileged materials from files other than the principal investigatory and case files. Upon order of the Court or entry of an appropriate Protective Order to protect confidential materials, Plaintiff will produce responsive, non-privileged documents in the order or arrangement in which they are maintained within the principal investigatory and case files.

4. Plaintiff objects to Instruction No. 8 regarding documents “in your possession, custody, or control” and “created, transmitted, or received by you” to the extent that it purports to impose obligations greater than those set forth in the Federal Rules of Civil Procedure. Plaintiff further objects to this instruction as overbroad and unduly burdensome to the extent it seeks (a) documents in the possession, custody, or control of individuals, agencies, or entities other than the Antitrust Division of the Department of Justice and its present employees, principals, officials, agents, attorneys, economists, and consultants either assigned to or reviewing this case, (b) documents previously produced by Defendant to the Antitrust Division of the Department of Justice in the course of the antitrust investigation leading up to the filing of this case, transcripts of depositions of employees and former employees of Defendant, correspondence between the Plaintiff and Defendant, and (c) documents in possession, custody, or control of the Antitrust Division of the Department of Justice and its present officers, employees, principals, officials, agents, attorney, and consultants to which the attorney work product doctrine, governmental deliberative process privilege, attorney-client privilege, or any other lawful privilege is applicable.

OBJECTIONS AND RESPONSES TO DOCUMENT REQUESTS

DOCUMENT REQUEST NO. 1:

All documents obtained by the DOJ pursuant to its CID investigation of Dentsply's distribution and marketing of artificial teeth.

RESPONSE TO DOCUMENT REQUEST NO. 1:

Plaintiff objects to this request to the extent that it calls for documents readily or more accessible to Defendant from Defendant's own files, including without limitation documents produced by the Defendant to Plaintiff. Plaintiff further objects to this request to the extent that it requires the production, prior to the entry of a Protective Order by the Court and prior to instruction from the Court as to production pursuant to Del. D. Ct. Rule 26.2, of potentially confidential materials produced to Plaintiff by third parties.

Plaintiff further objects to this request as vague and ambiguous because it relies on the undefined term "CID investigation." While "CID" is defined in Definition No. 3 to refer to "Civil Investigative Demand No. 13009 issued to Dentsply by the DOJ in connection with its antitrust investigation of Dentsply prior to the filing of its complaint on January 5, 1999," that definition gives no greater meaning to the phrase "CID investigation," unless it is intended to limit the document request to material produced in response to Civil Investigative Demand Number 13009. During its civil investigation of Dentsply's distribution and marketing of artificial teeth, Plaintiff issued a number of CIDs calling for documents and obtained other documents without issuance of a CID.

Subject to and without waiver of the foregoing objections, and although not called for by this Request, Plaintiff will produce all non-privileged, responsive documents obtained from

third parties during its civil investigation of Dentsply's distribution and marketing of artificial teeth, with the exception that Plaintiff will withhold any documents or material that may contain confidential information until it receives direction from the Court regarding production pursuant to Local Rule 26.2 or a Protective Order has been entered by the Court allowing the production of that material.

DOCUMENT REQUEST NO. 2:

All transcripts of oral testimony (via deposition) taken by the DOJ pursuant to the CID investigation, including transcripts of third party CID witnesses.

RESPONSE TO DOCUMENT REQUEST NO. 2:

Plaintiff objects to this request to the extent that it calls for deposition transcripts readily or more accessible to Defendant from Defendant's own files, namely transcripts of depositions of former and present employees of Defendant. Plaintiff further objects to this request to the extent that it requires the production, prior to the entry of a Protective Order by the Court and prior to instruction from the Court as to production pursuant to Del. D. Ct. Rule 26.2, of third-party depositions, all of which potentially contain confidential information of third parties.

Plaintiff further objects to this request as vague and ambiguous because it relies on the undefined terms "CID investigation" and "CID witnesses." While "CID" is defined to refer to "Civil Investigative Demand No. 13009 issued to Dentsply by the DOJ in connection with its antitrust investigation of Dentsply prior to the filing of its complaint on January 5, 1999," that definition gives no greater meaning to the phrases "CID investigation" and "CID witnesses," because Civil Investigative Demand Number 13009 did not command oral

testimony. During its civil investigation of Dentsply's distribution and marketing of artificial teeth, Plaintiff deposed a number persons pursuant to various CIDs calling for oral testimony.

Subject to and without waiver of the foregoing objections, and although not called for by this Request, Plaintiff will produce transcripts of depositions of third parties taken during its civil investigation of Dentsply's distribution and marketing of artificial teeth. Because, however, all such transcripts of depositions of third parties taken during its civil investigation of Dentsply's distribution and marketing of artificial teeth may contain confidential information, Plaintiff will withhold production of such transcripts until it receives direction from the Court regarding production pursuant to Local Rule 26.2 or a Protective Order has been entered by the Court allowing the production of that material.

DOCUMENT REQUEST NO. 3:

All copies of discovery requests served upon third parties in connection with the DOJ's CID investigation of Dentsply.

RESPONSE TO DOCUMENT REQUEST NO. 3:

Plaintiff objects to this request as vague and ambiguous because it relies on the undefined term "CID investigation." While "CID" is defined to refer to "Civil Investigative Demand No. 13009 issued to Dentsply by the DOJ in connection with its antitrust investigation of Dentsply prior to the filing of its complaint on January 5, 1999," that definition gives no greater meaning to the phrase "CID investigation," unless it is intended to limit the document request to Civil Investigative Demand Number 13009 itself. During its civil investigation of Dentsply's distribution and marketing of artificial teeth, Plaintiff issued a number of CIDs

calling for documents and oral testimony and obtained other documents without issuance of a CID.

Subject to and without waiver of the foregoing objections, and although not called for by this Request, Plaintiff will produce copies of those CIDs and correspondence requesting documents and information from third parties.

DOCUMENT REQUEST NO. 4:

All documents relating to responses or objections to discovery requests served upon third parties in connection with the DOJ's CID investigation of Dentsply.

RESPONSE TO DOCUMENT REQUEST NO. 4:

Plaintiff objects to this document request to the extent it seeks production of documents protected by the work product doctrine, the governmental deliberative process privilege, or the attorney-client privilege. In addition, the Parties currently are in discussions about the appropriate scope of the privilege log. Plaintiff objects to each document request to the extent that it calls for production of a privilege log for internal documents of the Antitrust Division. A request for such a log is unreasonable and unduly burdensome in light of the work product doctrine and other privileges protecting such internal documents from discovery. Therefore, given the ongoing discussions about the scope of the privilege log and Plaintiff's objections to a request for such a log, Plaintiff will not produce a log of this material at this time.

Plaintiff further objects to this request to the extent that it requires the production, prior to the entry of a Protective Order by the Court and prior to instruction from the Court as to production pursuant to Del. D. Ct. Rule 26.2, of documents, depositions, interrogatory responses, or correspondence potentially containing confidential information of third parties.

Plaintiff further objects to this request as vague and ambiguous because it relies on the undefined terms “CID investigation.” While “CID” is defined to refer to “Civil Investigative Demand No. 13009 issued to Dentsply by the DOJ in connection with its antitrust investigation of Dentsply prior to the filing of its complaint on January 5, 1999,” that definition gives no greater meaning to the phrase “CID investigation,” unless it is intended to limit the document request to Civil Investigative Demand Number 13009 itself. During its civil investigation of Dentsply’s distribution and marketing of artificial teeth, Plaintiff issued a number of CIDs calling for documents, information, and oral testimony and obtained other documents and information without issuance of a CID.

Subject to and without waiver of the foregoing objections, and although not called for by this Request, Plaintiff will produce other correspondence to and from third parties, relating to responses or objections to discovery requests, and non-privileged responses and objections to discovery requests obtained during its civil investigation of Dentsply’s distribution and marketing of artificial teeth, with the exception that Plaintiff will withhold any correspondence, responses, or objections that may contain confidential information until it

receives direction from the Court regarding production pursuant to Local Rule 26.2 or a Protective Order has been entered by the Court allowing the production of that material.

COUNSEL FOR PLAINTIFF
UNITED STATES OF AMERICA

_____/s/_____
Mark J. Botti
William E. Berlin
Jean Lin
Michael S. Spector
Michael D. Farber
United States Department of Justice
Antitrust Division
325 Seventh Street, N.W., Suite 400
Washington, DC 20530
(202) 307-0827

CARL SCHNEE
United States Attorney

_____/s/_____
Judith M. Kinney (DSB # 3643)
Assistant United States Attorney
1201 Market Street, Suite 1100
Wilmington, DE 19801
(302) 573-6277

DATED: March 5, 1999